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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re C.B., a Person Coming Under the
Juvenile Court Law.

B217918
(Los Angeles County
Super. Ct. No. CK47594)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.B.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Stephen Marpet, Juvenile Court Referee. Affirmed.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, Los Angeles County Counsel, James M. Owens, Assistant County Counsel, Deborah H. Hale, Deputy County Counsel for Plaintiff and Respondent.

I. INTRODUCTION

J.B. (the mother of C.B.) appeals from an order denying a Welfare and Institutions Code¹ section 388 petition filed by her on May 13, 2009 to modify a January 23, 2009 juvenile court order. C.B. had been in legal guardianship with his maternal grandfather, D.C. since June 2003. The January 23, 2009 order granted a section 388 petition brought by I.P. (the father of C.B.) to terminate the legal guardianship, change the mother's visitation from unmonitored to monitored, and order the child placed in the father's home in Florida. The mother's May 13, 2009 petition sought C.B.'s return or alternatively reinstatement of reunification services with unmonitored visits or shared custody with the father. We affirmed the January 23, 2009 order granting the father's section 388 petition on October 16, 2009 in an unpublished opinion. (*In re C.B.* (Oct. 16, 2009, B214522) [nonpub. opn.])

In this appeal, the mother asserts the juvenile court violated her due process rights by refusing to grant a continuance of a hearing on her May 13, 2009 petition in violation of section 364.05. The mother also contends the juvenile court conducted the hearing on her May 13, 2009 petition in a manner which did not comport with procedural due process requirements. We affirm the order denying the mother's May 13, 2009 petition.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

II. FACTS AND PROCEDURAL HISTORY

A. Background From the Prior Appeal

On February 18, 2010, we granted the mother's request to judicially notice our unpublished opinion filed on October 16, 2009. The parties agree that the decision provides a convenient and complete record of the factual and procedural history of this case. We adopt the statement of background facts from the prior opinion *In re C.B.* (Oct. 16, 2009, B214522 [nonpub. opn.]) "This family initially came to the juvenile court's attention on January 31, 2002 when the Los Angeles County Department of Children and Family Services filed a section 300 petition on behalf of the child who was a four-year-old boy. The addendum report stated that the child had been detained because the mother had a history of domestic violence in her relationships. The mother also associated with gang members. The gang members had 'blown' out the windows of the home in which she and the child lived. The mother also had a history of extreme mood swings and did not take prescribed psychotropic medication to alleviate her mental and emotional problems. The mother had a history of leaving the child with relatives for extended periods and failing to provide him with the basic necessities of life. The child was placed in the home of the maternal grandfather, D.C. Also residing in the home was the maternal grandfather's companion, S.S. The father was originally only identified as the alleged father, who lived in Michigan. The paternal grandfather stated the father had been paying child support to the mother. But these payments stopped when the father began receiving disability payments.

The mother appeared at the January 31, 2002 detention hearing. The juvenile court ordered the child detained and granted the mother monitored visits. The department was ordered to make efforts to locate the child's father. For the pretrial conference on March 12, 2002, the department reported that the mother admitted using marijuana and methamphetamines. She admitted the drugs affected her mood. The mother also admitted that she associated with a gang member. According to the mother, the gang

member destroyed her home and her clothing. The maternal grandfather stated the mother had a history of instability and transiency. The mother was homeless for five days in January 2002. The maternal grandfather cared for the child for eight months from December 2000 to August 2001. The mother failed to pick up the child from daycare one day. The maternal grandfather found the mother passed out at her home.

On March 12, 2002, through mediation, the mother agreed to submit to the juvenile court's jurisdiction. The juvenile court sustained the petition as amended and declared the youngster to be a dependent child as described in section 300, subdivision (b). As sustained, the petition alleged: the mother had a history of substance abuse and experienced mood swings; this periodically limited her ability to provide regular and adequate care for the child; and such placed the child at risk of physical and emotional harm. The juvenile court ordered: the child placed with the maternal grandfather; family reunification services be provided to the mother; the mother and child to have monitored visits; and no services be provided to I.P., who was the alleged father. (As will be noted, I.P. was later certified in fact to be the child's father.) The mother was ordered to participate in drug rehabilitation, random testing and individual and drug counseling. The mother was ordered to consult with a psychiatrist. The mother was also ordered to complete counseling and to attend Alcoholics or Narcotics Anonymous. On April 5, 2002, the court granted the maternal grandfather's de facto parent standing application. The application was granted over the objections of the mother's and the child's attorneys.

On June 11, 2002, the department reported that the maternal grandfather had given a letter containing the father's return address in New York. Notice was sent to the father at that address. The child was reported to be doing well in the maternal grandfather's home. However, the maternal grandfather and the daycare provider reported the child suffered from nightmares throughout the night and during naps. A social worker, Kimberly M. Jones, reported that the mother interacted appropriately with the child during visits. When the mother would attempt to hug the child, he would place his arms to his side and lean his body into hers so as to embrace her. The child asked if they could live together in the maternal grandfather's home. The maternal grandfather was

concerned about a man identified only as Michael who appeared at the visits with the mother during the month of April. Michael subsequently appeared alone at the paternal grandfather's home. Michael identified himself as the mother's boyfriend. The mother stated that the man identified only as Michael had been harassing her and that she was applying for a restraining order against him. The maternal grandfather was also concerned about the mother's habit during the time allotted for visits of spending her time watching television or going through 'her belongings' in his garage.

According to the department, the mother had completed a parenting class. The mother tested positive for marijuana on February 19, 2002. The mother tested positive for codeine after being prescribed a medication for a recurring illness. The prescribed medicine contained codeine. The mother was enrolled in drug counseling. The mother had been treated at Long Beach Mental Health Center in 2000. The mother was diagnosed with major depressive disorder when discharged in July 2000. The mother had not complied with the juvenile court order to obtain an individual therapist. The department reported the mother was making progress in complying with other juvenile court orders. The department social worker was concerned about the mother's failure to obtain individual counseling. The department was also concerned about the mother's housing situation. The mother lived in a sober living complex, which accepted children. However, there were individual rooms but not separate apartments. And there were male residents at in the complex.

At the six-month review hearing on September 10, 2002, the juvenile court found that the mother was complying with the case plan. The juvenile court gave the mother unmonitored visits. The department was ordered to pay for the mother's counseling. The juvenile court continued family reunification services.

On March 11, 2003, for the 12-month review hearing, the department reported that the child was doing well in D.C.'s custody. D.C. and his companion wanted to pursue legal guardianship because: the mother seemed to be making positive changes in her life; the mother was undergoing individual counseling; and the mother was also in conjoint counseling with the child. With one exception, the mother had tested clean except for

one test that was positive for Benzodiazepines. The mother could not explain why Benzodiazepines were in her system. According to the department social worker, the mother's visits with the child went well. She had two unmonitored visits with the child. The mother said she had not had more because she was not financially able to take him to the places he wanted to go. The mother also was inhibited because she did not have a car but had to take a bus. The mother subsequently obtained a car but did not have insurance.

On February 20, 2003, the mother stated she was attending school and wanted to have a career so as to better provide for the child. The mother felt that between work and school she would have very little time for the child. She wanted to have the child remain with the maternal grandfather in a stable environment. The mother agreed the best plan for the child was for the maternal grandfather to have legal guardianship. The mother signed an affidavit agreeing to terminate family reunification services and have the maternal grandfather obtain legal guardianship of the child.

On March 11, 2003, the juvenile court terminated family reunification services and set the matter for a section 366.26 hearing to address the legal guardianship issue. In June 2003, the department submitted a report which recommended a permanent plan of legal guardianship with the maternal grandfather and S.S. The department reported that the child had lived with the two men off and on. This had been going on since the child was nine months old. When the child was not living with the couple, he was spending his weekends with them. The maternal grandfather and S.S. stated that they would be interested in pursuing adoption in the future if the mother did not continue making progress toward reunifying with the child. The child stated he wanted to live with the two men. The mother was attending weekly therapy sessions. The therapist, Dr. Trevor Monroe, recommended that the mother continue with therapy to deal with her past problems.

On June 10, 2003, the juvenile court granted legal guardianship to the maternal grandfather and S.S. The matter was continued to June 24, 2003 to allow preparation of guardianship letters. On July 11, 2003, the juvenile court: appointed the maternal

grandfather and S.S. as the child's legal guardians; ordered visitation for the mother as arranged by the guardians; and terminated the parental rights of the father. The juvenile court terminated jurisdiction pursuant to Kinship Guardianship Assistance Payment Program.

On November 24, 2008, the father filed a section 388 to change the legal guardianship order and termination of his parental rights. The father requested he be granted custody. The father desired to live with the child. The section 388 modification petition also requested that the child be permitted to use the father's name. The modification petition alleged that the father discovered that the support provided the child was being given to the mother. The father discovered the funds were never provided to the child. The father was finally able to contact the child with the help of the maternal grandfather. The father and son had developed a relationship. The father resided in Florida with his wife and three stepchildren. The child had formed a bond with his father's family. The juvenile court set the matter for hearing on January 23, 2009.

In a report dated January 23, 2009, the department reported that the mother stated the father was in fact the biological father. He had been identified in the dependency proceedings as an alleged father. According to the department report filed January 23, 2009, '[The f]ather reported . . . that he has two possession charges for marijuana and one felony charge for paraphernalia possession dated 2001 / 2002 in Livingstone County, Michigan.' After the paternal grandfather died, the father began using cocaine ""off and on"" and heavily smoking marijuana. The father stated that the drug paraphernalia belonged to his roommate, but the father was also charged. The father moved to New York and then Florida without dealing with the Michigan charges. The father was placed on probation for nine months and was ordered to complete a substance abuse program and drug testing. The father had not been arrested since 2002. The father's wife had never been arrested.

The child stated that he felt comfortable being with his new family during the holidays. The stepmother was nice to him. The child felt comfortable living with his step-siblings. The child understood that the legal guardianship would have to be

terminated. The child stated: “I understand and I want to be with my dad permanently. I know my dad would have full custody of me. I bonded more with my dad when I was in Florida. We had heart to heart talks once or twice.” The child stated about the mother, if he moved to Florida: “She might be disappointed, but she did this. Until she fixes this I don’t want to live with her. She did something bad. She doesn’t act like a mom. [The stepmother] acts more like a mom.”

The maternal grandfather and the father had spoken. The father saw pictures on MySpace that the mother posted of the child. The father had called the child every day since September 29, 2008. The maternal grandfather loved the child. The maternal grandfather thought that the child should be with the father. The child told the maternal grandfather, ‘You mean I have a dad who loves me.’ According to the grandfather, the mother visited the child but not consistently.

The father had been searching for the child since 2002. The father did not have a current address for the mother. He had been paying child support to the mother for a number of years. The father discovered that the child was not living with the mother but she was still collecting the child support. The maternal grandfather requested that the amounts of money the Michigan court had ordered the mother to pay be redirected to the father to support the child in Florida. The maternal grandfather was also working with the Michigan authorities to forgive any amounts in arrears that the father may owe to the maternal grandfather. The department recommended that the father, as a non-offending parent, be given sole legal and physical custody of the child. The department further recommended that the legal guardianship be rescinded and that jurisdiction be terminated.

The mother and the father appeared at the January 23, 2009 section 388 hearing. The mother and father were each appointed counsel. The mother’s counsel, Linda Simmons, made an oral continuance request. Ms. Simmons stated that she had just been appointed and needed time to prepare a section 388 on the mother’s behalf. The child’s attorney, Renee Mundon, opposed the continuance request. Ms. Mundon argued that the mother’s section 388 petition was only being contemplated as a response to the father’s modification request. Ms. Mundon further argued the mother had taken no steps to

assume the obligations of custody for several years. According to Ms. Simmons, the mother would have filed her own section 388 but for a threat by the maternal grandfather. According to the mother, she had been told by the maternal grandfather that if she filed a section 388 petition, she would have no contact with the child.

Ms. Mundon, the child's attorney, subsequently requested that the mother's visitation with him be monitored. Ms. Mundon argued that the visits with the child should be monitored because the guardians were already monitoring the mother's contact over the past several months. Over the mother's objection, the juvenile court granted the mother monitored visitation. But the juvenile court invited the mother to file her own section 388 petition in which she could address potential visitation liberalization. In ordering monitored visits the juvenile court stated: 'Well, now that the department is involved, I'm going to order that mother's visits be monitored. The department will have discretion to liberalize mother's visits consistent with her participating in whatever programs she was previously ordered to do. [¶] She can file a [section] 388 [petition] to liberalize visits and have further contact.'

The juvenile court denied the mother's request to continue the father's section 388 hearing. The juvenile court then granted the section 388 petition, terminated the legal guardianship, changed the mother's visitation from unmonitored to monitored, and ordered the child placed in the father's home. The order was conditioned upon the child finishing the school year in California. The court set a review hearing for July 24, 2009." [End of quotation from *In re C.B.*, *supra*, at pp. 2-9.]

On March 24, 2009, the juvenile court conducted a hearing on the father's petition to change the child's last name to C.P. The petition was granted without objection.

The mother appealed the juvenile court's January 23, 2009 order granting the father's section 388 petition, case No. B214522. As previously noted, on October 16, 2009, we affirmed the order terminating the legal guardianship, changing the mother's visitation from unmonitored to monitored, and placing the child in the father's home.

B. Information From the Current Appeal

While the appeal in Case No. B214522 was pending, the mother filed a section 388 petition on May 13, 2009 to change the January 23, 2009 order. In the May 13, 2009 petition, the mother requested return of the child. Alternatively, she requested: reinstatement of reunification services with unmonitored overnight visits leading to placement with her; shared custody with the father; or liberal unmonitored overnight and holiday visitation. The mother alleged: there was a deep parent/child bond between her and the child; the mother had consistently visited; and the mother had progressed to the point where she could offer the child security, safety, permanence and stability and meet the child's daily needs.

In support of her section 388 petition, the mother filed a declaration. The mother stated that the child had been out of her care since 2002. The juvenile court ordered her to comply with a case plan in March 2002 in order to reunify with her son. The case plan included drug counseling, random drug testing and therapy. The mother had been drug free for six years. The mother was given unmonitored four-hour per week visits with the child from August 28, 2002 until January 23, 2009. After the maternal grandparent was given legal guardianship in 2003, the mother was allowed to have overnight visits in the mother's home. There were never any problems with the visits.

The mother declared that she had only agreed to the legal guardianship in 2003 to prevent the child from being adopted. The mother had not filed a section 388 sooner because the maternal grandfather told her she would never see the child again if she tried to get him back. The mother denied withholding information about the child's father from the department. She told the department the city where the father was living in 2001. The mother wanted custody because her life was stable and she had been drug free for about seven years. She would not deny the father access to the child and was willing to share custody if the juvenile court denied her custody request.

The mother further declared that she was in a long term relationship with Ronald Mauldin. Mr. Maudlin cared for and had a strong relationship with the child. The

mother had been employed by the County of Los Angeles as a homecare provider for six years. The father advised the mother that the father's wife and children had left the father. The child would not have the benefit of the father's entire family life in Florida. A move to Florida with a single parent in an unfamiliar state was not in the child's best interest. It was in the child's best interest to have frequent, unmonitored contact with both parents and the maternal grandfather.

The mother attached: copies of drug tests for the years 2002 and 2003; certificates from completed parenting classes dated May 10, 2002; a department report dated September 10, 2002 outlining the mother's progress and compliance with the case plan; letters from two separate psychologists indicating the mother was participating in therapy as of October 4, 2002 and February 11, 2003; a certificate from the Outpatient Recovery Services Program of the Atlantic Recovery Services dated November 24, 2002; twelve step meeting logs from 2002; and several character letters. The letter dated February 11, 2003 recommended the mother attend 15 sessions of individual counseling.

The mother also submitted a declaration from Mr. Maudlin. Mr. Maudlin had lived with the mother for six years. He had never seen her act in an inappropriate way with the child. The child had told him a number of times that he wanted to live with the couple. In January 2008, the maternal grandfather threatened to stop the mother's visits if the child continued to say he wanted to live with the mother.

On June 3, 2009, the juvenile court set the section 388 petition for a hearing on July 24, 2009. The child's attorney pointed out that the mother's drug testing evidence dated back to 2003. And, there had been allegations that the mother appeared to be under the influence during the guardianship. The juvenile court ordered the department to provide random drug testing until the July 24, 2009 hearing. Cindy Johnston, counsel for the department objected to the court's order on the ground the case was not in reunification.

For the July 24, 2009 hearing, the department filed an interim review report. The department reported the mother stated on July 21, 2009 that she did not attend the additional 15 sessions that had been recommended by the mother's therapist in 2003.

The mother stated that she did not have the money and the department did not pay for them. The mother indicated that she had not followed up with a psychiatrist for medication due to an anxiety disorder diagnosis. This was because the therapist did not make the recommendation and her condition did not require medication. The mother had not attended any aftercare programs, such as Narcotics Anonymous since November 2002. The mother thought she did not have to attend the programs because her case was closed.

The maternal grandfather reported that the child and the mother did not have overnight visits until mid 2004 due to the mother's living conditions. The mother and child did have unmonitored day visits. In April 2008, the child developed severe stomach pains. An endoscopy and colonoscopy exam revealed no disease. A Pediatric Gastroenterologist suggested that the cause of the stomach pains was emotional stress. The maternal grandfather suggested the mother's visits remain monitored because the mother has cried in past visits and had been untruthful to the child. According to the maternal grandfather, the mother uses her emotions to manipulate the child. The stress caused the child to have severe stomach pains. The department also attached to the report a three-page letter from the maternal grandfather. The letter gave specific examples of what had occurred when the mother and the child had visited. According the maternal grandfather, the mother was receiving child support from the father through the State of Michigan and never said anything about it. She also got \$2000 from the father to pay for the child's annual gymnastics fees but the mother never paid the fees. In all the years, the mother only bought the child one pair of shoes.

The child met his father in December 2008, for the first time. The child decided he did not want to have any visits with the mother. The child was upset with her because she did not tell him that she was having contact with the father and knew where the father lived. The mother and the child did not begin to visit again until April 23, 2009. This was because, on January 23, 2009, the court ordered the mother's visits to be monitored but the mother did not call the department to set up visitation until April 23, 2009.

The department further reported that on May 21, 2009, the mother became very emotional after a visit with the child. The mother began to cry and blamed the father and the maternal grandfather for taking the child away from her. According to the mother, the two men conspired against her. They do not want her to have a relationship with the child. The child had become distant towards her since he had been in contact with the father. During a monitored visit with the child on June 24, 2009, the child decided to end the visit 15 minutes early. The mother began to cry. The child became nervous. The child subsequently stated: "I ended the visit because I was bored. It wasn't because of my mom. I was kind of scared in saying goodbye to her. I didn't know what she was going to say or do. I did not know how to end it." The child seemed to be nervous and sad.

Also on June 24, 2009, the child stated that he was happy to be leaving with the father. The child wanted to be with the father. The social worker asked the child would he like to live with the mother, the father or the maternal grandfather. The child responded: "My mom can't take care of me. I don't have my own room, space, and it's too cluttered. She can't take care of me either. I would choose between my dad and grandfather. First my dad and if that could not happen then I would just stay with my grandpa."

The child also stated that he was upset with the mother. He was upset that she knew where his father was and never told him. He was perplexed as to why she initially told him she was happy that he would be living with the father in Florida but, would then file a section 388 petition. According to the child, he does not understand the mother because she tells him one thing and does another. The child stated that he would not discuss his feelings with the mother. He stated: "I won't talk to mom. It's my decision. I don't want to live with her. She submitted paperwork for nothing; no way can she force me to be with her."

The father reported the mother's boyfriend, Mr. Maudlin, had been texting negative comments to the father on a daily basis. Case social worker, Diana Flores, read an obscene text message from Mr. Maudlin to the father. Mr. Maudlin also attempted to

persuade the father not to take the child to Florida. Mr. Maudlin suggested that he and the father meet to “fight” it out on the side.

At the July 24, 2009 hearing, the mother’s counsel, Linda Simmons requested a continuance of the matter. Counsel argued: “I just got a report today, particularly the [section] 388 petition, which has several attachments. They are new to me and the maker of this one report, the maternal grandfather, who has . . . over a three-page, single-spaced statement, not under penalty of perjury, is not available for cross-examination. [¶] There are other documents, apparently, that are . . . purported to be from the State of Michigan, . . . that I have not had a chance to view earlier.” Ms. Simmons requested a continuance in order to subpoena the grandfather and for the social worker to be present. County counsel advised the court that the social worker was on her way to the hearing.

The juvenile court denied the continuance request. The court then denied the mother’s section 388 petition on the ground it was “clearly not in the minor’s best interest” to grant the petition. At which point, Ms. Simmons requested an opportunity to cross-examine the child. The court denied the request as unnecessary due to the information before the court which was sufficient to deny the section 388 petition. Ms. Simmons queried whether she could argue the petition. The court initially denied the request. But, the following colloquy then took place. “Ms. Simmons: Please may I be heard on this? We were not granted our request to have a continuance at our hearing in January. Mother was not able to contest the termination of the legal guardianship or to put on evidence regarding giving custody to the father. We needed time to prepare for that. [¶] There are a lot of issues that needed to be addressed. Namely, it was always her contention that the legal guardian, grandfather, had given her, during the course of the guardianship, unmonitored overnight visits, and even in the reports today, that is confirmed. Grandfather saw no harm in the mother’s living condition, her ability to take care of the child, and nothing untoward occurred when she had monitored contact, including overnights, and she disputes what is said in these reports. That continued through the year 2008. [¶] And she is prepared to testify, so if you are not going to . . . hear from the minor, I would like to call the mother to testify. [¶] The Court: What

mother says is really of no import to the court's decision that it is not in this minor's best interest. Whether mother had monitored or unmonitored contact with the child, that is not relevant. [¶] The issue is whether it is in this 11-year-old minor's best interest, and everything before me indicates – even if mother were to get on the stand and whatever she is going to say. [¶] Ms. Simmons: Part of the [section] 388, though, was also to consider changing that order of [January 23, 2009] from monitored back to how it had been by usage. The grandfather, who was the legal guardian, saw fit to give her overnights and unmonitored contact. The only thing that happened in the interim was the father appearing on the scene, and, from then, the mother was denied her visitation. [¶] So I think ... the grandfather thought it was in the child's best interest. The child enjoyed the visits. Nothing really happened."

The juvenile court then requested the child to leave the courtroom. At which point, Ms. Simmons argued: "Nothing really happened except the father comes on the scene, and now the child does not – and the court has decided to give the mother only monitored visits." The juvenile court explained: "And it is only monitored because this child has felt deceived by mother, who has kept this child from his father all of his life, and that is the genesis of this whole issue. [¶] Father is here. The child wants to live with the father. He wants to go with him. He doesn't want to have unmonitored visits with his mother at this time. [¶] But father has indicated he will be willing to allow him to have unmonitored once the child has grown up a little bit more and has calmed down and has decided he wants to have more contact with mother." Ms. Simmons continued to argue: "That is speculation, your honor. ¶ She did find out about where the father was, that she looked him up. She did let [the child] know that."

The juvenile court then reiterated that the mother's section 388 petition was denied. On July 30, 2009, the mother filed a notice of appeal from the juvenile court's

July 24, 2009 order. On September 24, 2009, we denied the mother's motion to consolidate the current appeal with the appeal in Case No. B214522.²

III. DISCUSSION

The mother contends the July 24, 2009 order denying her section 388 petition must be reversed because the juvenile court violated her due process rights by: failing to grant a continuance pursuant to section 364.05 when the mother did not receive the social worker's report prior to the hearing; and refusing to allow the mother to present evidence at the hearing on her section 388 petition.

A. Denial of the Continuance Request

The mother asserts her statutory due process rights under section 364.05³ were violated when the court refused to continue the July 24, 2009 hearing on her section 388

² The July 24, 2009 order terminated jurisdiction through a family law exit order. "As a general rule, an order terminating juvenile court jurisdiction renders an appeal from a previous order in the dependency proceedings moot. [Citation.]" (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1488; *In re A. R.* (2009) 170 Cal.App.4th 733, 740.) However, the mother's rights were adversely affected by the award of sole custody to the father as well the order requiring the mother's visited to be monitored. Thus, the issues have not been rendered moot because the potential exists for adverse collateral consequences. (See *In re C.C.*, *supra*, 172 Cal.App.4th at p. 1488; *In re A.R.*, *supra*, 170 Cal.App.4th at p. 740; *In re Dylan T.* (1998) 65 Cal.App.4th 765, 769.)

³ Section 364.05 provides: "Notwithstanding Section 364, in a county of the first class, a copy of the report required pursuant to subdivision (b) of Section 364 shall be provided to all parties at least 10 calendar days prior to the hearing. This may be accomplished by mailing the report at least 15 calendar days prior to the hearing to a party whose address is within the State of California, or at least 20 calendar days prior to the hearing to a party whose address is outside the State of California. The court shall grant a reasonable continuance, not to exceed 10 calendar days, upon request by any party or his or her counsel on the ground that the report was not provided at least 10 calendar days prior to the hearing as required by this section, unless the party or his or her

petition. This is because: she did not receive the department July 24, 2009 section 364⁴ report 10 days before the hearing; the juvenile court failed to make the requisite finding on clear and convincing evidence “the party’s ability to proceed at the hearing is not prejudiced by the lack of timely service of the report”; no findings were made about the late report; and the mother needed time to review the department’s response to the mother’s section 388 petition and the grandfather’s three-page letter. The department counters: the due process claims were forfeited because they were not raised in the lower court; the focus of the July 24, 2009 hearing was to address the mother’s section 388 petition so section 364.05 was not applicable since the continuance request was subject to the good cause requirement of section 352; and any due process violation was harmless error.

The record shows the juvenile court on January 23, 2009 granted the father’s section 388 petition, terminated the legal guardianship, changed the mother’s visitation from unmonitored to monitored, and ordered the child placed in the father’s home. The matter was continued to July 24, 2009 for a status review. At the January 23, 2009

counsel has expressly waived the requirement that the report be provided within the 10-day period or the court finds that the party’s ability to proceed at the hearing is not prejudiced by the lack of timely service of the report. In making this determination, the court shall presume that a party is prejudiced by the lack of timely service of the report, and may find that the party is not prejudiced only by clear and convincing evidence to the contrary.”

⁴ Section 364 provides in pertinent part: “(a) Every hearing in which an order is made placing a child under the supervision of the juvenile court pursuant to Section 300 and in which the child is not removed from the physical custody of his or her parent or guardian shall be continued to a specific future date not to exceed six months after the date of the original dispositional hearing. The continued hearing shall be placed on the appearance calendar. The court shall advise all persons present of the date of the future hearings, of their rights to be present, and to be represented by counsel. [¶] (b) At least 10 calendar days prior to the hearing, the social worker shall file a supplemental report with the court describing the services offered to the family and the progress made by the family in eliminating the conditions or factors requiring court supervision. The social worker shall also make a recommendation regarding the necessity of continued supervision. A copy of this report shall be furnished to all parties at least 10 calendar days prior to the hearing.”

hearing on the father's section 388 petition, the juvenile court invited the mother to file her own section 388 petition. The mother filed her section 388 petition on May 13, 2009. At the June 3, 2009 hearing, the court ordered the department to provide random drug testing. The department's report detailed the mother's compliance (or lack thereof) with the case plan as of 2009. The report also attached a letter from the maternal grandfather concerning the mother's visitation. The maternal grandfather expressed his support of the father having custody of the child. The report also contained documents from the State of Michigan concerning the mother's support obligations. The report documented that the mother was receiving child support from the father for a number of years which she kept for herself. Although the focus of the July 24, 2009 hearing ultimately was the mother's section 388 petition, the report was prepared pursuant to section 364 after the juvenile court ordered a status review hearing. Thus, section 364 applies to the mother's continuance request because the report and hearing were prepared in part for the status review hearing. We, therefore, disagree with the department that section 364.05 is inapplicable to this case.⁵

Nevertheless, the department correctly points out that the mother failed to assert the statutory due process claim in the juvenile court. Due process claims may be

⁵ The department asserts that the mother's request to continue the hearing on her section 388 petition should have been made under section 352, which is the primary statute governing continuances in dependency cases. (*Renee S. v. Superior Court* (1999) 76 Cal.App.4th 187, 194; *In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1186-1187.) Such a continuance may be granted upon a good cause showing. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585; *In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810.) However, continuances are disfavored in dependency cases due to the state's interest in expediting the proceeding to resolve the child's status without delay. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1636, *In re Elijah V.*, *supra*, 127 Cal.App.4th at p. 585; *In re Karla C.* (2003) 113 Cal.App.4th 166, 179; see also *In re Jesusa V.* (2004) 32 Cal.4th 588, 625.) Furthermore, the continuance will not be granted if it is contrary to the minor's best interest. (§ 352, subd. (a); *In re Emily L.* (1989) 212 Cal.App.3d 734, 742-743.) The denial of a continuance request is reviewed for an abuse of discretion. (*In re David H.*, *supra*, 165 Cal.App.4th at p. 1635; *In re Karla C.*, *supra*, 113 Cal.App.3d at p. 180; *In re Gerald R.*, *supra*, 1 Cal.App.4th at p. 1187; *In re Angela R.* (1989) 212 Cal.App.3d 257, 265-266.)

forfeited when the constitutional issue is not asserted in the juvenile court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re A.E.* (2008) 168 Cal.App.4th 1, 4-5; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 222.) Here, the mother never claimed that her due process rights were being violated by the court's refusal to grant a continuance; so the due process claim has been forfeited. (*In re Jason J.* (2009) 175 Cal.App.4th 922, 932; *In re A.E., supra*, 168 Cal.App.4th at pp. 4-5.)

However, even if the claim was not forfeited, the mother cannot prevail on the claim that the order denying her section 388 petition must be reversed. The failure to grant a continuance is subject to a harmless beyond a reasonable doubt analysis. (See *In re James F.* (2008) 42 Cal.4th 901, 905; *In re Jesusa V., supra*, 32 Cal.4th at pp. 625-626; *In re Justice P.* (2004) 123 Cal.App.4th 181, 193; *Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1387.) The mother has not demonstrated the outcome would have been different if she had been given a continuance to review the report. (See *In re Gerald J., supra*, 1 Cal.App.4th at pp. 1186-1187 [no showing a different result would have been reached when court denied continuance request when counsel received children's assessment on same day of hearing on permanency planning order].) The mother has not stated what evidence she would have offered if the court had granted her continuance request. It is not clear how a continuance would have resulted in different ruling. This case was set for a review hearing after the child had been ordered placed with the father in January 2009. The mother filed her section 388 petition on May 13, 2009. The mother presented numerous documents and evidentiary support for her section 388 petition. A hearing on the mother's petition was set for July 24, 2009. At that time, the child had been in a legal guardianship since 2003. Even before the dependency action was filed, the maternal grandfather had cared for the child from December 2000 to August 2001. The mother knew that her compliance with the case plan was at issue for her section 388 petition. The mother was also aware that the department had supported the child's placement with the father and monitored visits with the mother. The mother also knew that the maternal grandfather supported the father having custody of the child. He had consistently provided statements to the department to that effect long before the

July 24, 2009 was prepared. More importantly, the child had long since expressed a complete lack of interest in residing with the mother dating back to 2003. By contrast, since the child had met the father, the child continued to express an unequivocal desire to live with his father. The mother has not shown what would have been added to the proceedings if the continuance had been granted. There is simply no evidence that a continuance would have resulted in a more favorable outcome.

B. The Procedures at the July 24, 2009 Hearing

The mother also claims a due process violation from the manner in which the July 24, 2009 hearing was conducted. According to the mother, the juvenile court “summarily denied the mother’s section 388 petition after previously ordering a hearing” as in the child’s best interests. She claims the court failed to permit testimony or to allow counsel to argue the merits of the petition.

We disagree that the petition was summarily denied. What actually occurred is that the juvenile ordered the hearing but did not allow testimony at the hearing. Instead, the juvenile court received written evidence and allowed counsel to argue the motion. Thus, the juvenile court conducted a hearing but, denied the petition on the merits based on the evidence. It was within the court’s discretion to decide the petition without testimony based on the documentary evidence and counsel’s argument. (Cal. Rules of Court, rule 5.570(h); *M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1181-1182; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081; *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146-1147.)

Even if the court erred and the mother should have been allowed to present testimonial evidence, the mother must show the error was harmless beyond a reasonable doubt. (*M.T. v. Superior Court, supra*, 178 Cal.App.4th at pp. 1181-1182; *In re Thomas R.* (2006) 145 Cal.App.4th 726, 734.) The mother has not established it is not reasonably likely any such testimony would have persuaded the juvenile court to grant the section 388. (*In re C.J.W., supra*, 157 Cal.App.4th 1081; *In re Justice P., supra*, 123

Cal.App.4th at p. 193; *Andrea L. v. Superior Court*, *supra*, 64 Cal.App.4th at p. 1387; *In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) Furthermore, the mother has not indicated what information was excluded by the refusal to allow testimonial evidence.

In denying the mother's section 388 petition, the juvenile court stated that it was focusing on the child's best interest. The court's determination must be based on the best interests of the child and is not limited to only whether the mother demonstrated a change in circumstances. (§ 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) In this case, the modification petition was filed on May 13, 2009. Reunification services had terminated for the mother in 2003. Before reunification is terminated, the Legislature recognizes "a parent who has a child removed for neglect, abuse or substantial risk thereof, in most cases should be provided with services to assist the parent in overcoming the problems that led to the removal. (§ 361.5.)" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.) However, the Legislature has also recognized a child should not be required to spend their lives in the uncertainty of foster care and that there must be a limitation of the length of time a child is required to wait for a parent to become adequate. (*Ibid.*) After reunification services have been terminated, the court's focus has shifted to the needs of the child for permanency and stability. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317; *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.)

The mother's modification request was six years after efforts to reunite the mother and child had ended. The child had been in a legal guardianship since 2003. By the time the mother filed her section 388 petition in May 2009, the child was almost 12 years old. The child was equivocal about his visits with the mother. The child had clearly expressed the lack of interest in living with mother. Instead, the child unequivocally expressed his desire to live with his father. Indeed, the child had not wanted to live with the mother since 2003 when he was about five years old. Rather, the child preferred to live with the maternal grandfather, who had been his legal guardian since 2003. The child had spent a majority of his life in the maternal grandfather's care beginning with the dependency proceeding filed in January 2002 when the child was four years old. Additionally, the

record shows the maternal grandfather had been an active caretaker for the child since the child was nine months old. The mother did nothing between the time the legal guardianship was established in 2003 and 2009 to reunify with the child. The mother only filed her section 388 petition in May 2009 after the father filed his section 388 petition in November 2008. The juvenile court granted the father's section 388 petition in January 2009, and ordered the child placed with the father. Our Supreme Court has held: "In any custody determination, a primary consideration in determining the child's best interest is the goal of assuring stability and continuity. [Citation.] 'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role.'" (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The need for continuity and stability, thus, may often "dictate" the conclusion of what is in the child's best interest. (*Ibid.*) In such cases, the court is required to give substantial weight to the need for prompt resolution of the minor's custody status, the need for the minor to have a stable environment, and the damage to the minor from prolonged temporary placements. (*In re Gerald R.*, *supra*, 1 Cal.App.4th at p. 1187; *In re Debra M.*, *supra*, 189 Cal.App.3d at p. 1038.) Under these circumstances, the court could properly determine there was a need for a prompt resolution of the minor's custody status, a need for the minor to have a stable environment, and a need to prevent damage to the minor from prolonged temporary placements. (*In re Gerald R.*, *supra*, 1 Cal.App.4th at p. 1187; *In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.) The child had not changed his position that he does not want to live with the mother since 2003. The child has also indicated that he does not want unmonitored visits with the mother. The January 23, 2009 order placed the child in the father's custody and terminated jurisdiction. Thus, there is absolutely no showing that it was in the child's best interest to be reunited the mother or to allow her unmonitored visits. There was nothing amiss with the juvenile court order refusing the mother's late efforts to further delay the proceedings when the child was about to be placed in home with the father and to be removed from the dependency court. (§ 352, subd. (a); *In re Emily L.*, *supra*, 212 Cal.App.3d at pp. 742-743.)

IV. DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WEISMAN, J.^{*}

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.